80-466

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

AUGUSTUS P. SORIANO, M.D.,

Petitioner,

v.

R. L. MOORE, M.D., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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September 22, 1980

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QUESTIONS PRESENTED

1. Whether, in the face of some record evidence tending to show that respondent physicians had engaged in anticompetitive practices affecting interstate commerce, and under circumstances where petitioner had been precluded from introducing further evidence bearing on the antitrust issue, a directed verdict was proper in a Sherman antitrust action based on a denial of full hospital staff privileges to petitioner herein, notwithstanding this Court's holding in *Continental Ore* to the effect that evidence in antitrust cases must be viewed in the light most favorable to petitioners and that it was the jury's function to weigh the evidence and the inferences to be drawn therefrom and to come to an ultimate conclusion on the facts.

2. Whether the district court's action in granting a directed verdict under the circumstances of this case ignores this Court's expansive interpretation of the jurisdictional reach of the Sherman Act, as shown by a long line of decisions, beginning with *Mandeville Farms*, followed by the *Goldfarb* and *Rex Hospital* opinions, and recently in the *McLain* case.

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OPINIONS BELOW

There is no written opinion from the Court of Appeals for the Fifth Circuit but its *per curiam* order affirming the decision of the District Court is reprinted in the Appendix hereto, pp. 18a-19a, *infra.* The opinion of the District Court for the Southern District of Mississippi is reprinted in the Appendix hereto, pp. 14a-17a, *infra.*

JURISDICTION

The Judgment of the Court of Appeals was rendered on May 15, 1980. No petition for panel rehearing was filed. A timely application for extension of time to

file a writ of certiorari was filed on August 9, 1980. and was granted by this Court. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Article I § 8 of the Constitution of the United States provides in pertinent part that:

> The Congress shall have Power
>
> . . .
>
> to regulate commerce with Foreign Nations, and among the several States, and with the Indian Tribes;
>
> . . . .

B. 15 U.S.C. § 1 provides in pertinent part that:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal.

C. 15 U.S.C. § 15 provides that:

> Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of this suit including a reasonable attorney's fee.

D. 15 U.S.C. § 26 provides in pertinent part that:

> Any person . . . shall be entitled to sue for and have injunctive relief, in any court of the United

States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws.

E. 28 U.S.C. § 1254(1) provides that:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . .

STATEMENT OF THE CASE

This private antitrust action for treble damages and injunctive relief was filed by the petitioner, a Filipino doctor, alleging among other matters that the action of the respondent members of the medical staff and Board of Trustees of the Neshoba County General Hospital in Philadelphia, Mississippi, in denying him full staff privileges constituted a combination and conspiracy to restrain trade in violation of Section 1 of the Sherman Act and violated his civil rights as guaranteed by the Constitution and laws of the United States.

The jurisdiction of the district court was invoked under Section 1 of the Sherman Act, 15 U.S.C. § 1; under 42 U.S.C. §§ 1981 and 1985; and under 28 U.S.C. § 1331 (general federal question jurisdiction).

The suit was filed on November 1, 1976 in the United States District Court for the Southern District of Mississippi. Made defendants were four doctors who are the only members of the Medical Staff, the Administrator

of the Hospital, and all seven members of the Board of Trustees.[1]

Several anticompetitive activities on the part of the members of the Medical Staff are alleged (the entire complaint is reprinted for the Court's reference at Appendix, pp. 1a-13a). The principal contention of the petitioner, however, on the antitrust issue is that the respondents' denial of full staff privileges to petitioner, although theoretically designed to promote professional competence and to serve the public, was economically motivated in that the respondent doctors will be the direct recipients of the patients whom petitioner will not be able to serve because of the loss of his privileges at the hospital.

Upon plaintiff's close of evidence, the defendants moved to dismiss the complaint based on the antitrust claim. The Court sustained the motion and directed a verdict for the defendants on the ground that the record was devoid of any evidence of interstate activity on the part of the Neshoba County General Hospital and the respondent doctors and that there was no "scintilla of evidence" of unlawful restraint in violation of Section 1 of the Sherman Act.

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[1]The following are the defendants: R. L. Moore, M.D., F. M. Blackwell, M.D., Charles N. Cannon, M.D., and J. H. Leigh, M.D., individually, and as members of the medical staff of Neshoba County General Hospital; Robert E. Turcotte, Jr., individually, and as Administrator of Neshoba County General Hospital; Willard C. Mott, Nathaniel Burkes, Herman Jackson, Rado McDaniel, Tom May, Dewey Nowell, and Cullen Thomas, individually, and as members of the Board of Trustees of Neshoba County General Hospital.

At issue on appeal to the Court of Appeals is the propriety of the lower court's action in granting a directed verdict on the antitrust issue and in denying petitioner's request to amend a pre-trial order and introduce further evidence on the antitrust issue.

The United States Court of Appeals for the Fifth Circuit affirmed the District Court's judgment without opinion.

REASONS FOR GRANTING THE WRIT

I.

THE COURT BELOW ERRED IN AFFIRMING THE DISTRICT COURT'S GRANT OF A DIRECTED VERDICT AGAINST PETITIONER ON JURISDICTIONAL GROUNDS, PARTICULARLY WHERE THERE WAS SOME RECORD EVIDENCE TENDING TO SHOW ANTICOMPETITIVE ACTIVITIES ON THE PART OF DEFENDANTS.

In view of the legal and factual complexities involved in antitrust suits and the important public policy considerations which they support, courts have time and again been cautioned not to summarily dispose of antitrust suits.[2]

This takes special significance when the issue has to do with the effect that certain anticompetitive practices may have on interstate commerce. In one case, the Court of Appeals for the Seventh Circuit[3] applied the jurisdictional standard previously laid down by the Court of

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[2] *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969); *Poller v. Columbia Broadcasting Systems, Inc.*, 308 U.S. 464 (1962); *United States v. Employing Plasterers Ass'n*, 347 U.S. 186 (1954).

[3] *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Assn.*, 484 F.2d 751 (C.A. 7, 1973).

Appeals for the Ninth Circuit in *Rasmussen v. American Dairy Assn.*, 472 F.2d 517 (1973);

> In essence the test is whether "[t]he facts of the particular situation . . . determine . . . [that the] relationship to interstate commerce is too tenuous in a practical sense to warrant federal control."

Adding that "such a conclusion can better be determined after a thorough exploration of all evidence that either side can produce, rather than by a motion to dismiss . . .," the appellate court found summary judgment to be improper on the jurisdictional issue. 484 F.2d at 759.

In *Continental Ore Co. v. Union Carbide and Carbon Corp.*,[4] this Court found the appellate court in error in concluding that there should have been a directed verdict for respondents, and in failing to view the evidence in the light most favorable to petitioners and to give them the benefit of all inferences which the evidence fairly supported.

Furthermore, the Court of Appeals also erred in finding the evidence insufficient to support a finding that respondents' conduct in fact caused injury to petitioners' business. This Court noted it was the jury's function to weigh the evidence and the inferences to be drawn therefrom and to come to an ultimate conclusion on the facts (p. 696-702).

Applying *Continental Ore* to the case at bar, it is submitted that the court below erred in affirming the district court's granting a directed verdict against the

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[3] 370 U.S. 690 (1962).

petitioner herein based on jurisdictional grounds without adequately examining and exploring the anticompetitive effect of defendants' action in denying him full hospital staff privileges.

It was patently wrong for the district court, acting on an oral motion to dismiss, without briefing, and without so much as a cursory examination of the voluminous record, to direct a verdict for the defendant physicians on the threshold question of jurisdiction in an antitrust suit filed by plaintiff. It was also a clear abuse of discretion for the court to deny petitioner the opportunity to introduce additional evidence bearing on the antitrust issue.

It will be noted that in *McLain,*[5] counsel had submitted briefs and the court had held oral argument and received post-argument briefs on the issue of jurisdiction alone; the trial court then held a conference with counsel, following which, plaintiff was allowed to depose nine witnesses who produced various documents. After the close of the discovery period and the filing of additional briefs, the court took the matter under submission and, having considered the memoranda of counsel and the relevant documents of record, issued a memorandum of opinion and order granting the motion to dismiss the complaint. 48 U.S.L.W. 4064-65.

In the case before this Court, although petitioner's trial attorney (Mr. Richards) was permitted to enter his appearance shortly before trial, he was not granted a continuance to enable him to prepare for the case. (Record, Vol. III, pp. 689-696). The district court also

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[5]*McLain, et al. v. Real Estate Board of New Orleans, Inc.*, 48 U.S.L.W. 4063 (1980).

denied his request to amend its pre-trial order by filing into the record the lists of supplemental witnesses and exhibits relating to the antitrust claim (Record, Vol. III, pp. 689-692), specifically, records and witnesses pertaining to financial audits of Neshoba County Hospital and to large, interstate corporations using the hospital's facilities as well as the services of the petitioner (Record, Vol. IV, pp. 54-55, 58-68).

At the trial, petitioner was prevented by the lower court from attempting to elicit information from witnesses regarding the change in referral policies by some interstate corporations after petitioner had been denied full staff privileges (Record, Vol. I, pp. 120-121), and from introducing evidence on income received by him from these companies (Record, Vol. II, pp. 456-463).

The trial court had concluded there was no scintilla of evidence that Neshoba County General Hospital was engaged in interstate commerce. The record, however, shows it is the only hospital in Neshoba County that provides medical facilities to the general public. It is funded by the use of public funds through the State of Mississippi (Record, Vol. I, p. 19, 133). The hospital was in receipt of medicare payments to the U.S. Department of Health, Education, and Welfare (Record, Vol. IV, p. 83).

In an apparent attempt to run petitioner out of the community, efforts were undertaken by members of the medical staff to persuade him to move his practice elsewhere (Record, Vol. I, p. 132). Because of the denial of full staff privileges, petitioner was unable to perform vital surgical procedures to the prejudice of those patients being treated by him (Record, Vol. II,

pp. 440-441). He eventually moved to another hospital where he was given unrestricted staff privileges. The director at that hospital testified as to petitioner's competence in the practice of medicine (Record, Vol. III, pp. 661-662).

The members of the Neshoba County Hospital medical staff were a closely knit group of doctors. The chief of the medical staff referred to all the physicians connected with the hospital's medical staff as members of "our medical family" (Record, Vol. I, pp. 135-36), also at p. 182). The revocation of one member's narcotics license and the dismissal of another from three other hospitals for alcoholism did not prompt an investigation by the medical staff of Neshoba County Hospital (Record, Vol. I, pp. 164, 197). The only investigation ever conducted on the competence of a physician in the hospital's history was the one involving the petitioner. This was initiated by the very same doctors who were members of the medical staff of the hospital. These were the same doctors comprising the Ad Hoc Committee that conducted the investigation of the petitioner. (Record, Vol. I, p. 21).

Because of the limitations placed on his staff privileges, the petitioner lost a number of referrals from poor blacks and Indians from the Federal Head Start Program—a federally funded program—because he could not perform surgery at the Neshoba County Hospital. (Record, Vol. II, p. 466). Defendant physicians herein had competed with the petitioner in handling referrals from large companies engaged in interstate commerce, among them Wells Lamont Corporation, Maulpas, and Weyerhaeuser and Lumber Corporation for the treatment and care of company employees. (Record, Vol. I,

p. 240 and p. 233). The practice of medicine in the area involved was "intertwined and indispensable" to practice at the hospital. (Record, Vol. I, p. 257).

Respondents, being the only other practicing physicians in the county, could benefit immeasurably from the petitioner's leaving the area. There was, therefore, at least some economic motivating factor for their limiting the staff privileges of the petitioner since, by doing so, they would be ridding themselves of a formidable competitor and, hence, retain a larger share of the patient population of Neshoba County.

The foregoing evidence on the record, taken as a whole, provides some basis to warrant a jury determination on whether the respondents' conduct did affect interstate commerce so as to bring such activity within the umbrella of the Sherman Act protection.

This Court's admonition in *Poller v. Columbia Broadcasting Systems, Inc.*,[6] is apropos in assessing the threshold issue of jurisdiction in an antitrust suit:

> "We believe summary judgment procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and the hostile witnesses thicken the plot . . ." [at p. 472-73].

Petitioner submits that instead of granting a directed verdict based on a jurisdictional determination, the district court should have allowed the jury, with proper instruction on antitrust jurisdictional issue, to weigh the evidence on the record and determine whether such

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[6] 308 U.S. 464 (1962).

evidence thus presented fulfilled the requirements for jurisdiction in the case.

II.

THE DECISION BELOW IGNORES THE BROADENING TREND IN THIS COURT'S INTERPRETATION OF THE JURISDICTIONAL REACH OF THE SHERMAN ACT, AS SHOWN BY A LINE OF DECISIONS, BEGINNING WITH *MANDEVILLE FARMS*, FOLLOWED BY THE *GOLDFARB* AND *REX HOSPITAL* OPINIONS, AND MOST RECENTLY, IN *McCLAIN v. REAL ESTATE BOARD OF NEW ORLEANS*.

Historically, the development of antitrust jurisprudence in this Court has been marked by a process of reevaluation to meet current economic realities. One can no longer ignore the fact that over the years the medical profession has become a powerful economic force in our society. Thus, this once public service-oriented profession is now as much concerned with increasing economic benefits as any other commercial pursuit.

Although medical regulations or sanctions may be theoretically designed to promote professional competence and to serve the public interest, they may also be motivated by economic considerations. Where, under the guise of maintaining professional competence, members of a hospital's board of trustees engage in conduct, *i.e.*, denial of full staff privileges, designed to eliminate or neutralize competition by a physician competitor to the prejudice of the latter and his patients, such conduct may have an anticompetitive effect and may be subject to antitrust scrutiny like the conduct of businessmen who conspire to deprive others of access to merchandise which they wish to sell to the public or

who try to divide geographic markets or allocate business among themselves.[7]

Anticompetitive practices in the field of medicine have been the subject of judicial scrutiny,[8] but have not been considered by this Court in an antitrust context.

Since nearly every economic act in our interrelated economy may have some effect on the flow of commerce, the broad application of the Sherman Act in this case to the full extent of congressional commerce power is constitutionally justified and finds support in prior decisions by this Court.

McLain, et al. v. Real Estate Board of New Orleans, et al.,[9] decided on January 8, 1980, was an important decision by this Court on Sherman Act jurisdiction. Apart from rejecting the Fifth Circuit's restrictive interpretation of the *Goldfarb* holding concerning the proper test of jurisdiction, this Court made the following observation:

> "Petitioner need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates . . ." (at p. 4066).

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[7]Where it is associated with price fixing, *e.g., Timken Roller Bearing Co. v. United States*, 341 U.S. 29 (1960), and where it is accompanied by other restraints, *e.g., United States v. Topco Associates*, 405 U.S. 596 (1972).

[8]*Group Health Coop. of Puget Sound v. King County Medical Soc'y*, 39 Wash. 2d 586, 237 P.2d 737 (1951); *Guerrero v. Burlington Memorial Hospital*, 70 N.J. 344, 360 A.2d 334 (1976); *Robinson v. Magovern*, No. 77-75, W.D. Pa., filed 5/22/79, 921 A.T.R.R. A-28; *see also* Rigler, *Professional Code of Conduct After Goldfarb: A Proposed Method of Antitrust Analysis*, 29 Ark. L. Rev. 185 (1975).

[9]48 U.S.L.W. 4063.

This Court also noted that a showing that the unlawful conduct itself had an effect on interstate commerce is not required in establishing jurisdiction, otherwise, jurisdiction would be defeated by a showing that the alleged restraint failed to have its anticompetitive effect.[10]

The denial of Sherman Act protection merely because a trial court has arbitrarily determined, as the district court appeared to have done in this case, that an alleged anticompetitive act will merely have a remote or incidental effect upon interstate commerce constitutes an unwarranted judicial constraint on antitrust jurisdiction not intended by Congress.

> ". . . in those cases in which the courts have used the jurisdictional requirements as a tool to dismiss complaints that are trivial or lack substantive merit, the courts should be criticized for misusing the jurisdictional dismissal. *Courts should deal with the substantive merits of a case directly rather than under the pretense of a jurisdictional determination* . . ."[11] (emphasis ours).

And while some showing of impact in interstate commerce may be necessary, proof of degree has not been required in prior decisions of this Court.

In the early case of *Mandeville Farms*,[12] this Court held that the amount of interstate commerce affected is not relevant in determining whether the Federal

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[10]*McLain* case, *infra*, at p. 4066.

[11]Jurisdictional Requirements—Conflicting Interprevations, Vand. L. Rev. 32:1215, October, 1979, at p. 1235.

[12]*Mandeville Island Farms v. American Crystal Sugar Company*, 334 U.S. 219 (1948).

Anti-Trust Act has been violated, as long as control is exercised effectively in the area and the conspiracy is shown to affect interstate commerce adversely.

Although it was held by the court in the *Goldfarb*[13] case that a sufficient substantial effect upon interstate commerce for jurisdictional purposes existed, the Court did not describe the character and amount of this effect. The opinion appears to suggest that the Supreme Court is not adverse to a nonquantifiable standard for jurisdictional purposes.

In the more recent decision of this Court on the same subject, *Rex Hospital,*[14] the Court made the observation that "wholly local business restraints can produce the effects condemned by the Sherman Act" as long as the alleged restraint "substantially and adversely affects interstate commerce." In calculating this effect, the Court stated that it should be based on "practical economics" (at p. 745).

Although "substantial" and "adverse" impact on interstate commerce may be required in invoking the Sherman Act's protection, it is apparent that this Court has been more concerned with the "adverse," rather than with the "substantial" impact of a particular restraint on interstate commerce in considering the jurisdictional issue.

It is fair to conclude then that this Court has adopted an expansive interpretation of the Sherman Act protection, preferring to deal with the substantive merits of

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[13]*Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975).

[14]*Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738 (1976).

a complaint rather than dismissing a case under the pretext of jurisdictional determination.

The court below, with the concurrence of the Fifth Circuit, has chosen to adopt a narrow interpretation of the jurisdictional requirements of the Sherman Act when it granted a directed verdict against the petitioner, even though there was some record evidence tending to show the anticompetitive practices of the respondents.

Under these circumstances, a reversal of the district court's ruling is required in order to prevent "a return to a jurisdictional analysis under the Sherman Act of an era long past."[15]

CONCLUSION

For these reasons, petitioner prays that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the district court decision.

Respectfully submitted,

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[15] *McLain, infra,* at p. 4066.

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

Civil Action No. E 76-87(N)

[Filed: Nov. 1, 1976]

AUGUSTUS P. SORIANO, M.D.,
Individually and on behalf of all of
his present and future patients,

Plaintiff,

v.

R. L. MOORE, M.D., F. M. BLACKWELL, M.D., CHARLES N. CANNON, M.D., and J. H. LEIGH, M.D., Individually and as members of the medical staff of Neshoba County General Hospital,

ROBERT E. TURCOTTE, JR., Individually and as Administrator of Neshoba County General Hospital,

WILLARD C. MOTT, NATHANIEL BURKES, HERMAN JACKSON, RADO McDANIEL, TOM MAY, DEWEY NOWELL, and CULLEN THOMAS, Individually and as members of the Board of Trustees of Neshoba County General Hospital,

Defendants,

COMPLAINT

Plaintiff files his complaint against defendants as follows:

JURISDICTION

1.

This action arises under the Fifth and Fourteenth Amendments to the Constitution; under 42 U.S.C. §§ 1981 and 1985; and under 15 U.S.C. § 1. The amount in controversy exceeds $10,000 exclusive of interest and costs. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1337 and 1341.

PARTIES

2.

Plaintiff, Augustus P. Soriano ("Dr. Soriano"), is a native of the Philippines who is a naturalized citizen of the United States and a resident of Neshoba County, Mississippi. Dr. Soriano brings this action on his own behalf and on behalf of all of his present and future patients.

3.

(a) Defendants R. L. Moore, M.D.; F. M. Blackwell, M.D.; Charles N. Cannon, M.D.; and J. H. Leigh, M.D.; ("physician defendants"), are physicians practicing medicine and residing in Philadelphia, Neshoba County, Mississippi. Other than Dr. Soriano, they are the only physicians in Neshoba County, and they were the entire medical staff of Neshoba County General Hospital at all times relevant hereto, except as otherwise stated in this

complaint. Each physician defendant is a party individually and in his official capacity as a member of the medical staff of Neshoba County General Hospital.

(b) Defendant Robert E. Turcotte, Jr., ("Turcotte"), is an adult resident citizen of Neshoba County, Mississippi, and is the Administrator of Neshoba County General Hospital. He is a party individually and in his official capacity as Administrator.

(c) Defendants Willard C. Mott; Nathaniel Burkes; Herman Jackson; Rado McDaniel; Tom May; Dewey Nowell; and Cullen Thomas; ("Trusteees"), are members of the Board of Trustees of Neshoba County General Hospital, a public hospital in Philadelphia, Mississippi, owned by the county and financed with funds from the United States Government under the Hill-Burton Act, the Medicare and Medicaid programs, and other federal programs. The Trustees operate the hospital pursuant to the authority contained in § 41-13-29. *Miss. Code Ann.* (1972), and they are parties individually and in their official capacities as Trustees.

4.

At all times relevant hereto each defendant was acting under color of law of the State of Mississippi.

COUNT ONE

5.

Dr. Soriano is a medical doctor duly licensed by the State of Mississippi to practice medicine. Since 1969, Dr. Soriano has served on the staff at the Veterans Administration Hospitals in Tuscaloosa, Alabama, and in Atlanta, Georgia; and from February, 1972, to July,

1974, he participated in a surgery residence program at the Veterans Administration Hospital in Tuskegee, Alabama, with rotation through some of the services of the surgery department of the University of Alabama Medical School.

6.

In June, 1974, Dr. Soriano applied to Neshoba County General Hospital for staff privileges. His application was approved in July, 1974. A copy of the approved application is Exhibit "A" hereto. In August, 1974, Dr. Soriano moved to Philadelphia, Mississippi, and established a private general practice. From August, 1974, until January, 1976, Dr. Soriano lived and practiced medicine in Philadelphia and was a full member of the medical staff of Neshoba County General Hospital along with the physician defendants who at that time were the only other practicing physicians in Neshoba County. During this period of time Dr. Soriano practiced medicine and performed general surgery procedures in a competent and professional manner.

7.

For the period January, 1976, through April, 1976, Dr. Soriano moved his medical practice to DeKalb, Mississippi, and used the Kemper County General Hospital where he carried on the same type and high quality practice of medicine as he had for the previous year and one-half in Philadelphia.

8.

In April, 1976, Dr. Soriano applied to Neshoba County General Hospital for readmission to the medical staff from which he had resigned four months earlier when he

moved to DeKalb. A copy of Dr. Soriano's April 15 letter to Turcotte is Exhibit "B" hereto; and a copy of his Application for Appointment to the Medical Staff is Exhibit "C" hereto. Dr. Soriano is competent and qualified for all medical ans surgical privileges requested on this application form.

9.

On or about May 10, 1976, the physician defendants met as the hospital medical staff and decided to deny Dr. Soriano any staff privileges at Neshoba County General Hospital so that he would not be able to practice medicine in that community. This decision to restrain Dr. Soriano's successful practice of medicine in the Neshoba County community was made to maintain the economic interest and professional standing of the physician defendants; the decision was made arbitrarily and capriciously, without regard to the general medical competence and qualifications of Dr. Soriano, and without regard to the medical needs of the community in general and the patients of Dr. Soriano in particular; and the decision was based upon the fact that Dr. Soriano is a native of the Philippines and a non-Caucasian.

10.

Since the decision was made by the physician defendants to deny Dr. Soriano admission to the medical staff, the physician defendants and Turcotte, with the approval of the Trustees, have willfully implemented a plan or scheme to carry out the purpose of the decision, which is to force Dr. Soriano to move his medical practice out of the Neshoba County community.

11.

On May 11, 1976, Turcotte notified Dr. Soriano that action on his application had been "deferred." On May 12, Dr. Soriano filed suit in Chancery Court of Neshoba County and on May 26, the Court denied a preliminary injunction when the Trustees agreed to allow Dr. Soriano to admit only obstetrical patients in labor and emergencies until the medical staff and Trustees had made a final decision on Dr. Soriano's application. This suit has been dismissed without prejudice.

12.

On July 6, 1976, the medical staff voted to reject Dr. Soriano's application. A copy of Turcotte's July 7 letter to Dr. Soriano is Exhibit "D" hereto. Attorneys for Dr. Soriano requested a statement of reasons and a hearing on the action of the medical staff. In response to these requests Turcotte wrote a letter dated July 22, 1976, a copy of which is Exhibit "E" hereto, which listed the charts of certain hospital cases allegedly mishandled by Dr. Soriano and "other reasons and subject matter considered" and which set a hearing date for August 14 (later rescheduled for August 28).

13.

On August 28 and 29, 1976, a hearing on the record was held before the "ad hoc committee" of the medical staff, which committee consisted of all of the physician defendants except Dr. Leigh, who was present for virtually the entire hearing along with Dr. Sidney Bondurant, a new member of the medical staff as of August, 1976. Dr. Soriano explained fully and to the satisfaction of any competent and impartial physician his actions in

connection with each of the hospital charts that the physician defendants questioned. Dr. Soriano denies that he mishandled any cases and he denies that any of the cases cited by the physician defendants are representative. He further denied the substance and materiality of the non-medical allegations that had been solicited from the hospital staff by Turcotte at the request of the physician defendants. In addition to Dr. Soriano's testimony, his general competence and qualifications were attested to by statements from three impartial physicians in neighboring counties.

14.

On September 23, 1976, the medical staff voted that Dr. Soriano be "provisionally appointed to Medical Staff under probationary conditions" and with many exceptions. A copy of the medical staff's action is Exhibit "F" hereto. On September 30, the Trustees voted to confirm the action of the medical staff. Turcotte notified Dr. Soriano of the Trustees' action by letter dated October 1, 1976. A copy of Turcotte's letter is Exhibit "G" hereto. The conditions and exceptions substantially deny Dr. Soriano surgical privileges and require consultation with physician defendants on all other non-routine matters. Therefore, this action denies Dr. Soriano the staff privileges applied for.

15.

Neither the medical staff, the Trustees or Turcotte have stated any reason or made any specific finding that purports to be the basis for their action. Dr. Soriano alleges that the real reasons are set out in paragraph 9 above.

16.

In furtherance of the plan or scheme to discredit Dr. Soriano and to force him to move his medical practice from Neshoba County, the defendants or an agent or employee of defendants on October 7, 1976, caused to be published in the *Neshoba Democrat,* the local weekly newspaper, the entire verbatim report of the medical staff (Exhibit "F" hereto). This report was calculated by the physician defendants to discredit Dr. Soriano and to destroy his medical practice through the groundless "conditions," "exceptions," self-serving statements and insinuations contained therein.

17.

Dr. Soriano has built up a substantial, professionally competent and economically successful medical practice in the Neshoba County area since he began practicing there in August, 1974. The action by the defendants prevents Dr. Soriano from rendering medical care to hundreds of present and past patients and to thousands of future patients in an area that is in acute need of more physicians. The action of the defendants is the proximate cause of direct economic injury and loss to Dr. Soriano and the proximate cause of loss by the patients of Dr. Soriano of adequate medical care.

18.

Dr. Soriano and his present and future patients are being irreparably injured by the action of the defendants and they have no adequate remedy at law.

19.

The action of the defendants is arbitrary, capricious and has no rational connection with the operation of a public hospital. Dr. Soriano is denied due process of law pursuant to the Fifth and Fourteenth Amendments to the Constitution and is therefore entitled to compensatory and punitive damages and injunctive relief.

COUNT TWO

20.

Plaintiff incorporates by reference paragraphs 2 through 19.

21.

The action by the defendants denied Dr. Soriano equal protection of the laws in violation of the Fourteenth Amendment, and therefore, Dr. Soriano is entitled to compensatory and punitive damages and injunctive relief.

COUNT THREE

22.

Plaintiff incorporates by reference paragraphs 2 through 19.

23.

The Neshoba County General Hospital is engaged in interstate commerce and the action by the defendants constituted a combination and conspiracy to restrain trade in violation of 15 U.S.C. § 1. Therefore, Dr. Soriano is entitled to recover treble damages from the defendants, jointly and severally.

COUNT FOUR

24.

Plaintiff incorporates by reference paragraphs 2 through 19.

25.

The actions of defendants constitute a continuing conspiracy to deprive Dr. Soriano of equal protection of the laws and of his liberty and proper without due proceess of law and in violation of 42 U.S.C. § 1985; therefore, Dr. Soriano is entitled to compensatory and punitive damages and injunctive relief.

COUNT FIVE

26.

Plaintiff incorporates by reference paragraphs 2 through 19.

27.

The actions of the defendants deprive Dr. Soriano of his right to enter into contracts on account of his race in violation of 42 U.S.C. § 1981; therefore, Dr. Soriano is entitled to compensatory and punitive damages and injunctive relief.

COUNT SIX

28.

Plaintiff incorporates by reference paragraphs 2 through 19.

29.

The actions of defendants constitute discrimination on the basis of race and national origin by a federally-funded institution in violation of Title VI, Civil Rights Act of 1964, (42 U.S.C. § 2000(d)); therefore, Dr. Soriano is entitled to compensatory and punitive damages and injunctive relief.

COUNT SEVEN

30.

Plaintiff incorporates by reference paragraphs 2 through 19.

31.

The physician defendants and Turcotte have acted and continue to act willfully, maliciously and in bad faith and Dr. Soriano is therefore entitled to punitive damages.

COUNT EIGHT

32.

Plaintiff incorporates by reference paragraphs 2 through 31.

33.

The present and future patients of Dr. Soriano constitute a class pursuant to Rule 23, Federal Rules of Civil Procedure, and said class is entitled to injunctive relief on the grounds and for the reasons set forth above on behalf of Dr. Soriano.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff prays this Court for:

A. A temporary restraining order, a preliminary injunction, and a permanent injunction enjoining the defendants to restore to Dr. Soriano his full staff privileges at Neshoba County General Hospital and enjoining the defendants from further actions and conspiracies attempting to cause Dr. Soriano to remove his medical practice from Neshoba County and to cooperate with Dr. Soriano in good faith in rendering medical care to his patients admitted to NeshobaCounty General Hospital;

B. An order certifying the present and future patients of Dr. Soriano as a appropriate class of plaintiffs;

C. Actual damages for economic loss and injury to reputation incurred by Dr. Soriano in an amount to be determined by the proof;

D. Damages in an amount treble the actual damages, plus reasonable attorney's fees, for violation of the Sherman Act (15 U.S.C. § 1).

E. Punitive damages in an amount twice the actual damages but not less than $1,000,000.00;

F. Interest and costs, including reasonable attorney's fees pursuant to 42 U.S.C. § 1988 (as amended October 19, 1976); and,

G. All other relief to which Dr. Soriano and plaintiff class may be entitled.

October 28, 1976.

/s/ _____

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APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

Civil Action No. E 76-87(N)

[Filed: June 20, 1978]

AUGUSTUS P. SORIANO, M.D.,
Individually and on behalf of all of
his present and future patients,

Plaintiff,

v.

R. L. MOORE, M.D., F. M. BLACKWELL, M.D., CHARLES N. CANNON, M.D., and J. H. LEIGH, M.D., Individually and as members of the medical staff of Neshoba County General Hospital,

ROBERT E. TURCOTTE, JR., Individually and as Administrator of Neshoba County General Hospital,

WILLARD C. MOTT, NATHANIEL BURKES, HERMAN JACKSON, RADO McDANIEL, TOM MAY, DEWEY NOWELL, and CULLEN THOMAS, Individually and as members of the Board of Trustees of Neshoba County General Hospital,

Defendants,

FINAL JUDGMENT

This action came on for trial on June 12, 1978, June 13, 1978, June 14, 1978 and June 15, 1978, before the Court, Honorable Walter L. Nixon, District

Judge, presiding, and a good and lawful jury duly selected and empaneled and sworn to try the issues, composed of James E. Robinson, Foreman, and eleven (11) others, with the hearing and trial being on the pleadings herein, including the complaint and amendment to complaint and answers thereto. The plaintiff and all defendants and their attorneys of record announced to the Court that they were ready for trial. The plaintiff and all defendants made their opening statements to the jury. The plaintiff presented his testimony and evidence and announced to the Court that plaintiff rested; thereupon, each defendant, individually and in their representative capacities made a motion to exclude the evidence and direct a verdict and enter a judgment for each on said motions. The Court sustained the motion to exclude the evidence and direct a verdict for all of the defendants on that portion of the suit on plaintiff's theory of a cause of action against defendants for a combination and conspiracy to restrain trade in violation of 15 U.S.C., Section 1. All the defendants, individually, and in their representative capacities announced to the Court that they rested and desired to present no testimony or evidence, and all of said defendants renewed their motions to exclude the evidence and direct a verdict and enter a judgment for all of the defendants on the remaining issues in the case, which motions were overruled by the Court; and all parties announced to the Court that they had no further evidence or testimony to present and all parties rested. The jury heard the testimony and evidence presented and received the instructions of the Court and heard argument of counsel for all the parties and the jury retired to consider their verdict and presently returned into open Court the following verdict, to-wit:

"We, the jury, find for all defendants."

The verdict was signed by all twelve (12) members of the jury. At the request of counsel for the plaintiff, the Court polled the jury and each juror responded to the poll that the quoted verdict was the verdict of the entire jury.

This Court has jurisdiction of the parties hereto and the subject matter hereof and authority to render this final judgment at this time.

Therefore, it is the order and judgment of this Court that said verdict be received and filed as the verdict of the jury in this case and that the plaintiff, Augustus P. Soriano, M.D., do have of and recover nothing from all the defendants named above, individually and in their representative capacities, and this action and suit and the complaint herein as amended is hereby dismissed on the merits and dismissed with prejudice to plaintiff as to all of said defendants, individually, and in their representative capacities.

All court costs in this action are assessed and taxed to plaintiff, and all the defendants named above are hereby adjudged to recover of the plaintiff, Augustus P. Soriano, M.D., all their costs in this action.

ORDERED AND ADJUDGED, this June 19th, 1978.

/s/ Walter L. Nixon
United States District Judge

APPROVED AS TO FORM:

/s/ Terry L. Jordan
Of Counsel for Plaintiff

/s/ Herman Alford
Of Counsel for R. L. Moore, M.D., Defendant

/s/ Arlo Temple
Of Counsel for Defendants,
R. L. Moore, M.D. and J. H. Leigh, M.D.

/s/ Roy Pitts
Of Counsel for All Defendants

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-2675

AUGUSTUS P. SORIANO, M.D.,
Individually, and on behalf of all
his present and future patients,

Plaintiff-Appellant,

v.

R. L. MOORE, M.D., *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

May 15, 1980

Before TUTTLE, RANDALL and TATE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

Costs are to be taxed against plaintiff-appellant.

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[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

A true copy

Test: Gilbert F. Ganucheau
Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ Joan Perkins
Deputy

New Orleans, Louisiana Aug. 8, 1980

ISSUED AS MANDATE: Jun 6, 1980

Supreme Court, U. S.
FILED
OCT 28 1980
MICHAEL RODAK, JR., CLERK

No. 80-466

In the Supreme Court of the United States

October Term, 1980

AUGUSTUS P. SORIANO,
Petitioner,

vs.

R. L. MOORE, M.D., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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October 21, 1980

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REVISION OF QUESTIONS PRESENTED

1. Whether the District Court properly exercised its discretion by refusing to allow a last minute modification of the pre-trial order and thereby excluding evidence which allegedly would have been introduced pertaining to petitioner's antitrust claim?

2. Whether the granting of the directed verdict in favor of respondents was proper on an antitrust claim based upon respondents' reasonable restriction of petitioner's hospital staff privileges where there was no record evidence of such quality and weight by which fair-minded jurors might have reached a conclusion that respondents' activities generated a substantial effect on interstate commerce or that respondents were motivated by an unlawful purpose?

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No. 80-466

In the Supreme Court of the United States

October Term, 1980

AUGUSTUS P. SORIANO,
Petitioner,

vs.

R. L. MOORE, M.D., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents respectfully request that this court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's *per curiam* opinion in this case.

STATEMENT OF THE CASE

Petitioner applied to the Neshoba County Hospital in 1974 and was promptly admitted to the medical staff at that time with full privileges. After practicing there for approximately one year, during which time he had become involved in a dispute with a nurse-anesthetist, petitioner voluntarily resigned and moved his practice to

a nearby town. (R., Vol. III, p. 417). In 1976, petitioner desired to return to Neshoba County Hospital. After considering his application, the Board of Trustees of the Neshoba County Hospital appointed petitioner to the medical staff and granted him all but 19 of the 374 privileges he had requested.

Petitioner filed a complaint in 8 counts in this case alleging that respondents' actions in restricting his staff privileges constituted violations of his constitutional civil rights and Section 1 of the Sherman Antitrust Act. The District Court proceedings began on June 12, 1978 at which time petitioner's motions for continuance and to supplement the pre-trial order were denied.[1] After hearing all of the evidence, the District Court granted a directed verdict as to the antitrust claim, and the jury rendered a verdict for respondents on all other issues, thus finding that petitioner had not been unreasonably deprived of any staff privileges. The Fifth Circuit affirmed the District Court in a *per curiam* order.

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1. The oral motion for continuance was not made until June 12, 1978. (R., Vol. I, p. 59). The case had been set for trial previously, and the District Court had granted petitioner's motion for a continuance on the basis that petitioner had discharged his previous counsel and employed new counsel who had not had adequate time to prepare. (R. Vol. I, p. 65). Neither respondents' attorneys nor the trial judge were aware prior to June 12, 1978, that petitioner planned to modify the April 17, 1978 pre-trial order with more than one supplemental note of evidence. (R. Vol. I, pp. 60-68).

REASONS WHY THE WRIT SHOULD BE DENIED

1. Neither the District Court's decision nor the record raises the first question as presented by petitioner.

Petitioner has cited several cases in which it was held that the issue of whether a defendant's conduct has a substantial effect on interstate commerce should be determined "after a thorough exploration of all evidence that either side can produce, rather than by motion to dismiss . . . ." *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Association,* 484 F.2d 751, 759 (7th Cir. 1973). The District Court in this case did not dispose of the issue of jurisdiction under the Sherman Act on a pre-trial motion, but properly directed a verdict for respondents on the issue after concluding as a matter of law that no evidence had been introduced of such quality and weight that the jurors in the exercise of impartial judgment might reach a different conclusion. *Boeing v. Shipman,* 411 F.2d 365 (5th Cir. 1969). Thus, petitioner has refused to recognize the "important distinction . . . between making a finding that there was sufficient evidence to satisfy the jurisdictional requirements of the Sherman Act after a full trial, and deciding the jurisdictional issue on the basis of an incomplete record presented for purposes of a motion to dismiss." *United States Dental Institute v. American Association of Orthodontists,* 396 F. Supp. 565, 577 (N.D. Ill. 1975).

The first Question Presented in the petition is whether a directed verdict was proper in view of "some record evidence tending to show . . . anticompetitive practices affecting interstate commerce, and . . . where petitioner had been precluded from introducing further evidence. . . ." The facts of record, however, do not support the formula-

tion of this question. The factual predicate in the first Question Presented by petitioner, that record evidence tends to show an effect on interstate commerce, is completely missing from this case. Petitioner's references to the business of the Neshoba County Hospital cannot serve to support this essential predicate, since the hospital has never been a party to this suit and since the District Court correctly held that there was no evidence of record "that the Neshoba County Hospital or any of the . . . defendants were engaged in interstate commerce. . . ." (R., Vol. III, p. 677).

In regard to petitioner's assertion that the record reflects a loss of petitioner's referrals from the Federal Head Start Program, the petitioner testified at trial that he still treats these referral patients and is merely prevented from performing certain surgical procedures on these patients at Neshoba County Hospital. (R., Vol. II, p. 466). Petitioner also testified that his income actually increased from 1974 through 1977. (R., Vol. II, pp. 463-65). Further, there is no evidence in the record that would raise an inference that any of the respondents treat out-of-state patients, or that any of the respondents make out-of-state purchases of supplies as was the case in *Mohammad v. Feminists Women's Health Center,* 586 F.2d 530 (5th Cir. 1979), *cert. denied,* 444 U.S. 924. Thus, the District Court was also correct in finding "a complete absence of any proof that any conduct on the part of any of the defendants substantially affected interstate commerce." (R., Vol. III, p. 677).

Petitioner complains of the District Court's refusal to allow a last minute modification of the pre-trial order so as to allow introduction of additional witnesses and evidence for which respondents' attorneys had not had time to prepare and the refusal to grant a second continuance for this case which had been pending for almost

two years and which had been continued previously on the same grounds of inadequate time for counsel to prepare the case. (R., Vol. 1, p. 64). These pre-trial rulings were within the scope of the District Judge's discretion.[2]

Petitioner states that he was prevented from asking a question "regarding the change in referral policies by some interstate corporations." (Petition, p. 8). The District Court correctly sustained an objection to the question referred to since it called for hearsay from the witness. (R., Vol. I, p. 121). Similarly, the District Court ruled that where the petitioner had failed and refused to supplement his interrogatory answers or to answer deposition questions pertaining to evidence of his income derived from these interstate corporations, petitioner would be precluded from introducing this evidence at trial. (R., Vol. II, pp. 456-463).

Petitioner has confused the issue of whether the District Court made proper procedural and evidentiary rulings prior to the introduction of evidence with the issue of whether the District Court properly granted a directed verdict after considering all evidence which had been admitted during the trial. There was no reversible error in any of the judge's procedural or evidentiary rulings. In any event these rulings are irrelevant to the issue of the propriety of the directed verdict based upon the facts in evidence.

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2. *Burdis v. Texas and Pacific Ry. Co.*, 569 F.2d 320, 323 (5th Cir. 1978) ("decisions concerning variance from the pre-trial order are within the sound discretion of the trial judge as interpreter of the pre-trial order."); *Sanden v. Mayo Clinic*, 495 F.2d 221, 227 (8th Cir. 1974) (refusal to allow a continuance when original attorney withdrew from the case and was replaced by another did not constitute error).

2. The decision below is not in conflict with this Court's unbroken line of decisions defining the jurisdictional breadth of the Sherman Act.

The Fifth Circuit fully considered and correctly decided the issue of whether there was sufficient evidence to present a jury question as to the jurisdictional requirements of the Sherman Act. The decision below is not in conflict with the recent case of *McLain v. Real Estate Board of New Orleans, Inc.*, 48 U.S.L.W. 4063 (1980) or the cases cited therein.

Petitioner has stated that anticompetitive practices in the field of medicine have never been considered by this Court in an antitrust action. (Petition, p. 12). However, in *United States v. Oregon State Medical Society*, 343 U.S. 326 (1952), this Court reviewed a lower court ruling dismissing an action brought to enjoin the Oregon State Medical Society, an Oregon corporation engaged in the sale of prepaid medical care, several county medical societies, and eight doctors from monopolizing the business of furnishing prepaid medical care on a contract basis. This court affirmed and gave the following rationale:

> So far as any evidence brought to our attention discloses, the activities of the [private associations] are wholly intrastate. The government did show that Oregon Physicians Service made a number of payments to out-of-state doctors and hospitals, presumably for treatment of policy holders who happened to move or temporarily be away from Oregon when need for service arose. These were, however, few, sporadic and incidental. . . .
>
> American Medical Ass'n v. United States, 317 U.S. 519, 87 L.Ed. 434, 63 S.Ct. 326, does not stand for the proposition that furnishing of prepaid medical care on a local plane is interstate commerce.

In addition, the various circuit and district courts considering the question have consistently ruled that complaints alleging that hospitals' trustees and staffs conspired to exclude a doctor from their medical staffs in restraint of competition so that potential patients failed to seek the doctor's services did not allege a sufficient effect upon interstate commerce to state a cause of action under the Sherman Act.[3]

Petitioner acknowledges that to establish the jurisdictional element of a Sherman Act violation under the "effect on commerce" theory, the plaintiff must "demonstrate a substantial effect on interstate commerce generated by respondents' . . . activity."[4] However, petitioner cannot in good faith rely upon any evidence in the record to support the argument that the activities of respondents could have had anything more than a remote or incidental effect on interstate commerce.

At trial, petitioner failed to introduce any evidence demonstrating a nexus between the respondents' conduct and interstate commerce. This is a simple case therefore,

---

3. *E.g., Harron v. United Hospital Center, Inc.*, 522 F.2d 1133, 1134 (4th Cir. 1975), *cert. denied*, 424 U.S. 916 (1976) ("[I]t is frivolous to urge that the employment of a single doctor . . . invokes the Sherman Act. . . ."); *Wolf v. Jane Phillips Episcopal Memorial Medical Center*, 513 F.2d 684 (10th Cir. 1975) (allegation that hospitals' trustees and staffs conspired to exclude plaintiff osteopath from staff in restraint of competition so that plaintiff lost potential patients was insufficient to invoke the Sherman Act); *Sokol v. University Hospital, Inc.*, 402 F. Supp. 1029, 1030 (D. Mass. 1975) ("[I]n isolated instance of the restriction on one doctor's privileges . . . has not been held to violate the Sherman Act. . . .").

4. *McLain v. Real Estate Board of New Orleans*, 48 U.S.L.W. 4063, 4066 (1980); *see Hospital Building Company v. Trustees of Rex Hospital*, 425 U.S. 738, 743 (1976) ("as long as the restraint in question 'substantially and adversely affects interstate commerce,' . . . the interstate commerce nexus required for Sherman Act coverage is established.").

of a record that fails to support petitioner's contention that the courts below ignored this Court's expansive interpretation of the jurisdictional reach of the Sherman Act.

3. Regardless of whether the decision below as to jurisdiction is correct, petitioner's argument is without merit.

Any error in granting the motion for the directed verdict would have been harmless. The jury was instructed to return a verdict for petitioner if it found that the defendants had unreasonably deprived petitioner of his staff privileges. (R., Vol. III, pp. 713-14; 721). Since a verdict was returned for respondents, the members of the jury necessarily found that the restraint had been reasonable under the evidence as presented. Thus, any error in directing a verdict for the defendants would have been harmless, since the Sherman Act has been construed to prohibit only those restraints which are unreasonable. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

In *Hatley v. American Quarter Horse Association*, 552 F.2d 646, 653-54 (5th Cir. 1977), the Association's breeding standards were tested under the rule of reason in an action for antitrust violations and denial of due process. The court held that the fact that the district court had specifically found that the Association's rules "were not applied in a discriminatory, arbitrary or capricious fashion" buttressed the appellate court's finding that there was no unreasonable restraint in violation of Section 1 of the Sherman Act.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 21, 1980